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CATHY A. CATTERSON
U.S. COURT OF APPEALS

EPICENTER RECOGNITION, INC. V. JOSTENS, INC.,
No. 02-56589

REINHARDT, Circuit Judge, dissenting

I respectfully dissent from my colleagues' decision to reverse the district court's through and reasonable decision.

In overturning the district court's decision, my colleagues have disregarded countless findings of fact – all, of course, made by the decisionmaker best positioned to make sense of a complex morass of often-conflicting evidence. A district court's findings of fact should not be disturbed unless we have a "definite and firm conviction that a mistake has been committed." Allen v. Iranon, 283 F.3d 1070, 1076 (9th Cir. 2002). Indeed, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1998). It seems plain to me that there are two permissible views of the evidence here.

The issue on which my colleagues and I seem to disagree[1] is whether the

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[1] My colleagues admit that there is sufficient evidence to support the district court's finding that the use of TSPs created a "small, though leaky, entry barrier." See slip. op. at __. Though I agree with my colleagues that the entry barrier was not overwhelming, courts generally examine the "practical effects" of exclusive-dealing agreements, not merely the form such agreements take. See Minnesota Mining and Manufacturing Co. v. Appelton Papers, Inc., 35 F. Supp.

district court erred in finding that Jostens' use of Total Service Program agreements (TSPs) acted as sufficient barriers to entry to satisfy the third prong of the "circumstantial evidence" test established by Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995). That case expanded the traditional "barriers to entry" test to ask not only whether "there are significant barriers to entry [but also whether] . . . existing competitors lack the capacity to increase their output in the short run." Id. at 1434. The Rebel Oil court, analyzing competitors in a predatory pricing dispute, held that

> Market power cannot be inferred solely from the existence of entry barriers and a dominant market share. The ability to control output and prices – the essence of market power – depends largely on the ability of existing firms to quickly increase their own output in response to a contraction by the defendant. Competitors may not be able to increase output if there are barriers to expansion. One such barrier is lack of excess capacity. Excess capacity is the capacity of the rivals in a market to produce more than the market demands at a competitive price. If the existing competitors are producing at full capacity, they may lack the ability to quickly expand supply and

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2d 1138, 1144 (D. Minn. 1999). The fact that the TSPs did not legally bind the parties to exclusive dealing is irrelevant; the district court made extensive factual findings about the "practical effects" of the TSPs – those findings belie my colleagues' claim that the only factor making TSPs exclusive was the "schools' own inertia." The district court found that many school administrators viewed the TSPs as "three . . . or five-year exclusive contracts" that were in fact "binding" and "exclusive." In other words, the district court interpreted the evidence before it as demonstrating that the TSPs' practical effect, in many instances, was to create exclusive, binding contracts. My colleagues point to *no evidence whatsoever* that demonstrates clear error in the district court's factual findings on this point.

> counteract a predatory's supercompetitive pricing. On the other hand, if rivals have idle plants and can quickly respond to any predator's attempt to raise prices above competitive levels, the predator will suffer an immediate loss of market share to competitors. In that instance, the predator does not have market power.

Id. at 1441 (internal citations omitted).

As the excerpted material should make clear, the Rebel Oil test was not meant to establish a mechanical rule holding that every time a competitor has the ability to produce more physical goods at a cheap price, no monopoly power can exist. Rather, we have explained Rebel Oil's "key question [to be] whether existing competitors and immediate potential entrants have sufficient capacity to *take business away* from the incumbent monopolist and thereby constrain the incumbent's ability to raise prices above competitive levels." Metronet Serv. Corp. v. US West Communications, 325 F.3d 1086, 1104 (9th Cir. 2003) (emphasis added); see also Image Technical Serv. Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997) (explaining that the heart of the "barriers to entry" and "barriers to expansion" inquiry is whether the market in question is unlikely to be self-correcting). My colleagues have erred in their mechanical application of the Rebel Oil test in lieu of a more straight-forward examination of the market, an examination in which the district court thoroughly engaged – and one that it then reasonably resolved in favor of Epicenter.

While the question of competing firms' abilities to expand output is certainly relevant in a predatory pricing case, it is at best of questionable relevance here. That is because, as the district court explained, the market for in-school sales of graduation products "is a unique market where competition does not necessarily mean lower prices due to the school's role as a gatekeeper." In this market, service and comfort are far more important variables than price; there is a finite number of purchasers (schools) who operate as gatekeepers to the vast sea of consumers; and, schools often tolerate, or in some cases encourage, higher prices from distributors like Jostens because of the suppliers' practice of granting schools rebates on the sales of particular products – the higher the price, the greater the aggregate size of the rebates, all at no cost to the schools. Moreover, the district court found that the practical effect of the TSPs, in many cases, was to deny competitors the ability to approach school administrators about switching suppliers. That finding led the district court reasonably to conclude that, despite Jostens' competitors' ability to expand in the market, Jostens still retained both the ability to exercise *some* control over prices *and* monopoly power by virtue of its ability to shut schools' doors to competitors' attempts to enter. Given the factual circumstances attendant to the market in question here, it makes no sense to conclude, as do my esteemed colleagues, that Epicenter's ability to produce goods quickly and at a cheap price negated Jostens' market power.

This is by no means an easy case with an obvious result. That the case is difficult, however, makes it all the more unfortunate that my colleagues have so casually disregarded the exceptionally careful and thoughtful findings of fact and law reached by the district court. I would affirm those findings. I respectfully dissent.